

**UNITED STATES BANKRUPTCY COURT  
FOR THE  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 05-13112-MWV  
Chapter 13

Robert J. Roy, Jr.,  
Debtor

Laura Jameson,  
Plaintiff

v.

Adv. No. 05-1169-MWV

Robert J. Roy, Jr.,  
Defendant

Cooper, Deans & Cargill, P.A.,  
Plaintiff

v.

Adv. No. 05-1210-MWV

Robert J. Roy, Jr.,  
Defendant

*Charles L. Greenhalgh, Esq.*  
*COOPER, DEANS & CARGILL, P.A.*  
*Attorney for Plaintiffs*

*Mark P. Cornell, Esq.*  
*Attorney for Defendant*

**MEMORANDUM OPINION**

Robert J. Roy, Jr. (the “Defendant”) is the defendant in two adversary proceedings. In the 05-1169-MWV adversary (the “Jameson<sup>1</sup> adversary”), the primary issue before the Court is whether a divorce decree awarded to Jameson a property interest in certain real estate or whether Jameson was awarded a sum certain. In the 05-1210-MWV adversary (the “Cooper adversary”), the issue before the

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<sup>1</sup> In some pleadings filed before the Court, the Plaintiff’s last name is “Jamison.” However, because the Plaintiff’s complaint names her as “Jameson,” the Court uses that spelling herein.

Court is whether the divorce decree's award of attorneys' fees is non-dischargeable pursuant to 11 U.S.C. § 523(a)(5). The Court has before it two motions for summary judgment. The Plaintiff in each adversary proceeding filed a motion to which the Defendant objected and cross-moved for summary judgment. As both adversary proceedings involve the same Defendant and interpretation of the same divorce decree, this opinion addresses the motions and cross-motions for summary judgment filed in both adversary proceedings.

### **JURISDICTION**

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

### **BACKGROUND**

The Defendant and Plaintiff Laura Jameson ("Jameson") are former spouses whose divorce decree was entered by the Carroll County, New Hampshire, Superior Court ("the superior court") on June 10, 2005. The divorce decree minces no words in describing the acrimonial nature of the divorce. Cooper, Deans & Cargill, P.A. ("Cooper"), is a law firm that represented Jameson during the divorce and also represents her, and itself, in the current adversary proceedings. At the time of the divorce, the Defendant was the one-half owner of Guldie's restaurant, which was also the marital home and continues to be the Defendant's residence. The divorce decree awarded to Jameson one-half of the Defendant's one-half interest in Guldie's. Additionally, the divorce decree ordered the Defendant to pay one-half of the legal fees incurred by Jameson in the divorce proceedings.

Prior to the issuance of the divorce decree, Jameson sought from the superior court a writ of attachment in order to protect her interest, which had yet to become a legal interest, in Guldie's. Soon after entering the divorce decree, the superior court approved the attachment, which Jameson recorded.

The Defendant filed a Chapter 13 petition on August 8, 2005. Jameson filed her complaint on October 13, 2005, seeking a declaratory judgment that she is the owner of a one-quarter interest in Guldie's and that her interest is not property of the Defendant's bankruptcy estate. The Defendant answered, arguing that Jameson was awarded a sum certain rather than an ownership interest, and asserted a counterclaim alleging that Jameson's attachment is avoidable under section 547. Cooper filed its complaint on November 30, 2005, seeking a determination that the attorneys' fees awarded by the divorce decree are nondishargeable pursuant section 523(a)(5).<sup>2</sup> Both Jameson and Cooper filed motions for summary judgment, and the Defendant filed cross-motions for summary judgment. The Court heard oral arguments concerning all motions and cross-motions for, and objections to, summary judgment on July 17, 2006, and took the matters under advisement.

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<sup>2</sup> All references to the "Bankruptcy Code" or to specific sections are to the Bankruptcy Reform Act of 1978, as amended prior to April 20, 2005, 11 U.S.C. § 101, *et seq.*

## **DISCUSSION**

### **A. The Summary Judgment Standard<sup>3</sup>**

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment should be granted only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” “Genuine,” in the context of Rule 56(c), “means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.” Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Prop., 960 F.2d 200, 204 (1st Cir. 1992)). “Material,” in the context of Rule 56(c), means that the fact has “the potential to affect the outcome of the suit under the applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the “record in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party’s favor.” Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994).

### **B. The Jameson Adversary: Ownership of Guldie’s Restaurant**

Jameson argues that (1) she was awarded a one-quarter property interest in Guldie’s, and (2) her property interest is not part of the Defendant’s bankruptcy estate. The Defendant’s position is that Jameson was awarded a sum certain based upon the value of the real estate rather than a property interest

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<sup>3</sup> Jameson and Cooper filed statements of material facts and supporting affidavits. In both adversary proceedings, the Defendant accepted both the statements of material facts and the Plaintiffs’ affidavits, objecting only to four paragraphs on the grounds that the paragraphs either contained conclusions of law or were irrelevant. The Defendant presented no additional material facts. Upon review, the Court agrees with the parties that there are no genuine issues as to any material facts. Essentially, the parties request that the Court decide the matters based on the divorce decree. See Cowell v. Hale (In re Hale), 289 B.R. 788, 798–99 (B.A.P. 1st Cir. 2003) (concluding that the court could properly rule on cross-motions for summary judgment where one party expressly adopted the opponent’s statement of material facts (which included facts determinative of the section 523(a)(5) inquiry) and failed to adduce additional material facts).

in Guldie's. The Defendant's counterclaim alleges that Jameson's writ of attachment is avoidable pursuant to section 547.

Under New Hampshire law, the following becomes marital property when a divorce petition is filed: "[A]ll tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties." N.H. REV. STAT. ANN. § 458:16-a(I). The superior court is empowered to equitably distribute marital property through a divorce decree. N.H. REV. STAT. ANN. § 458:16-a(II). In the time period between the filing of the petition for divorce and the entering of the divorce decree, "a non-owner spouse does not have legal title to marital property owned solely by the other spouse, but because a final divorce decree could award an interest in such property to a non-owner spouse, such a spouse has an equitable interest in the property sufficient to convey standing to protect the legal title to the property pending entry of a final divorce decree." In re Skorich, 332 B.R. 77, 84 (Bankr. D.N.H. 2005).

Jameson sought a writ of attachment from the superior court before the divorce decree was entered. At that time, she had an equitable interest in Guldie's. Jameson explains that her reason for seeking the writ of attachment was to protect her interest in the event that the Defendant's creditors attempted to attach marital property. See id. ("The equitable interest of a non-owner spouse in marital property does not supercede the rights of creditors of the owner spouse during the pendency of the couple's divorce proceeding."). The Court rejects the Defendant's position that Jameson's seeking of the writ of attachment prevents her from arguing in this Court that the divorce decree granted her a property interest in Guldie's. In seeking the attachment, Jameson merely sought to protect an equitable interest that could, if provided in the divorce decree, become a legal interest. The divorce decree turned that possibility into reality, and now Jameson is free to assert that the language of the divorce decree awarded her a one-quarter property interest in Guldie's.

Thus, the issue before the Court is whether the divorce decree awarded Jameson a property interest or a sum certain. The divorce decree states the following with regard to ownership of Guldie's:

Prior to the separation of the parties, [Jameson] also resided there with the [Defendant] as the marital home. [Jameson] has no title interest in this property, but the restaurant was purchased and the business was begun during the term of the marriage; both parties resided there and participated in the establishment and operation of the restaurant. The [marital] Master finds that the business and the real estate of Guldie's restaurant is a marital asset and that [Jameson] is entitled to one-half of the one-half interest of [the Defendant].

. . . .

. . . Since the [Defendant] is a one-half owner of the business and building, his one-half share is found to be \$97,452.61. [Jameson] is found to be entitled to one-half of the [Defendant's] equity in the marital home, or \$48,726.30.

The [Defendant], Robert J. Roy, Jr., shall pay to [Jameson] the sum of \$48,726.38 [sic] in full as her share of the equity in the Guldie's restaurant property no later than July 1, 2005. Upon payment, [Jameson] shall execute a quitclaim deed or any other documents necessary to release her property interests in this real estate to the [Defendant].

If the [Defendant] fails to comply with the provisions set forth above, said failure shall constitute a default and, as a result, the business, including all real and personal property, shall be listed for sale through an agreed business broker or realtor . . . and the proceeds of the sale, after the necessary commissions and expenses are paid, shall be divided equally between [the Defendant's business partner and half-owner of Guldie's] and [the Defendant], with [Jameson] being paid one-half of [the Defendant's] share. . . . [Jameson's] share shall be 25% of the net proceeds calculated by deducting the costs of sale, broker's commission, the first mortgage and the State of New Hampshire Department of Revenue lien. Her share shall not be affected by the American Express debt.

Although the decree orders the Defendant to pay a fixed amount of money, the decree gave the Defendant less than a month to pay the full amount of \$48,726.38. If the Defendant failed to pay, the decree ordered that Guldie's be sold and that Jameson receive one-quarter of the proceeds, not a fixed sum of \$48,726.38. In the event of a court-ordered sale, Jameson's share could be more than or less than \$48,726.38—whatever her one-quarter property interest was worth on the real estate market. The figure of \$48,726.38 represented Jameson's share from a constructive sale taking place at the time the decree was entered. The fact that Jameson could collect more or less than that figure indicates that the superior court did not award Jameson a sum certain. Rather, the language of the decree indicates that Jameson was awarded a one-quarter property interest in Guldie's. The decree even describes her share as a property

interest and directs Jameson to execute a quitclaim deed upon payment. Whether a quitclaim deed actually would have been necessary to release her interest is irrelevant. That Jameson's 25% share of the sale proceeds is determined after deduction of the mortgage on the Guldie's further reveals the superior court's intent to award Jameson a one-quarter ownership interest in the property. For these reasons, the Court holds that Jameson is the one-quarter owner of Guldie's.

Consequently, Jameson's property interest never became part of the Defendant's bankruptcy estate because the Defendant, at the time he filed his bankruptcy petition, did not have a legal or equitable interest in Jameson's interest in the real estate. See 11 U.S.C. § 541(a). The Court declines to apply the constructive trust rationales discussed in Davis v. Cox (In re Davis), 356 F.3d 76 (1st Cir. 2004), and In re Skorich, 332 B.R. 77 (Bankr. D.N.H. 2005), as those cases involved divorce decrees not issued until after the filing of a bankruptcy petition. The courts in both of those cases used the constructive trust theory to temporarily safeguard the equitable interests of non-owner spouses in situations in which the owner-spouse filed for bankruptcy after the divorce proceedings began but before a divorce decree was entered. The instant case is distinguishable, as the divorce decree awarded Jameson her property interest long before the Defendant filed for bankruptcy protection. Thus, Jameson was the legal owner of her interest before the bankruptcy estate came into being, and her interest never became estate property. Thus, Jameson is not a creditor of the Defendant's bankruptcy estate and she does not hold a claim against the estate. Cf. Lowenschuss & Sun Int'l N. Am. Inc. v. Selnick (In re Lowenschuss), 170 F.3d 923, 930 (9th Cir. 1999) (explaining that because the divorce court awarded the ex-wife an outright interest in the ex-husband/debtor's pension plan, the ex-wife's interest was neither a 'debt' nor could it be discharged in the debtor's subsequent bankruptcy).

As Jameson has a one-quarter legal interest in Guldie's that is not part of the bankruptcy estate, Jameson's motion for summary judgment is granted. Jameson is also granted summary judgment on the avoidance counterclaim because, as a matter of law, the Defendant cannot prevail on an avoidance action

under section 547; there is nothing to avoid in light of Jameson's property interest. The Defendant's cross-motion for summary judgment is denied.

**B. The Cooper Adversary: Attorneys' Fees**

Cooper represented Jameson in the divorce proceedings. The divorce decree orders the Defendant to reimburse Jameson 50% of the legal fees she incurred in connection with the divorce. Cooper seeks a determination that these fees are excepted from discharge pursuant to section 523(a)(5), which provides:

(a) A discharge under section . . . 1328(b) of this title does not discharge an individual debtor from any debt—

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree . . . .

11 U.S.C. 523(a)(5). Cooper argues that the award of attorneys' fees is in the nature of alimony, maintenance, or support, whereas the Defendant argues that the attorneys' fees were awarded to punish the Defendant.

Construction of the terms "alimony," "maintenance," and "support," as used in section 523(a)(5), is a matter of federal bankruptcy law, and this Court must look "beyond the labels" used by the superior court in the divorce decree. Cowell v. Hale (In re Hale), 289 B.R. 788, 791 (B.A.P. 1st Cir. 2003); Werthen v. Werthen (In re Werthen), 329 F.3d 269, 273 (1st Cir. 2003). Thus, even if the divorce decree describes an award as "attorneys' fees," that award may, for purposes of section 523(a)(5), be in the nature of alimony, maintenance or support, and, hence, non-dischargeable. The focus of the inquiry is the intent of the superior court and the intent of the parties at the time of the divorce decree. In re Hale, 289 B.R. at 796; see also In re Werthen, 329 F.3d at 273 ("Nominally, the critical issue is whether the divorce court judge 'intended' a particular award to be for support or for something else."). Consequently, the determination of whether an obligation is in the nature of alimony, maintenance, or support under section 523(a)(5) "is a case-specific, factual determination. In re Hale, 289 B.R. at 791. To guide the intent



inquiry, three principal factors are considered: (1) the language of the divorce decree; (2) the parties' financial circumstances at the time of the divorce decree; and (3) the function served by the award of attorneys' fees at the time of the divorce decree. In re Hale, 289 B.R. at 796; see also In re Werthen, 329 F.3d at 273.

The divorce decree contains the following paragraph labeled "Attorneys' Fees":

The [Defendant] shall pay 50% of the legal fees incurred by [Jameson] in this entire matter. Attorney Greenhalgh [of Cooper, Deans & Cargill] shall submit his affidavit of fees within 10 days of the Clerk's notice of this final decree for court review. This order does not include the award of attorneys' fees previously made in this matter. The amount of attorneys' fees owed to [Jameson] shall be deducted from the [Defendant's] share of the sale proceeds from Guldie's restaurant if not paid earlier. The Master finds that Superior Court Rule 59 provides for the award of attorneys' fees and costs for frivolous motions. [Jameson's] Request for Ruling of Law number 7 is granted with respect to the payment of attorneys' fees and costs for oppressive, vexatious, arbitrary, capricious or bad faith conduct and pleading and for requiring the opposing party to defend an action which has been prolonged without reasonable basis.

In addition, the superior court adopted the following finding of fact submitted by Jameson:

The [Defendant] has intentionally acted in a manner so as to unnecessarily prolong this litigation through oppressive, vexatious, arbitrary, capricious and bad faith conduct, including:

- a. Intentionally escalating [Jameson's] legal expenses by sending irrelevant, threatening and inappropriate letters to [Jameson's] counsel and the GAL, on almost a daily basis;
- b. Filing unnecessary, repetitive and irrelevant pleadings, requesting relief already previously denied, and attaching substantial and irrelevant exhibits to the pleadings, which in turn required [Jameson] to respond and thereby incur legal expense;
- c. Intentionally ignoring orders of this Court regarding custody resulting in [Jameson] having to file unnecessary motions to regain custodial rights already awarded to her;
- d. Acting in a manner so as to attempt to intimidate [Jameson], [Jameson's] counsel, [the son's] day care providers and the GAL;
- e. Systematically and intentionally stopping or avoiding any attempt to allow an investigation of his parenting by the GAL, or Jen Bella, as ordered by this Court;
- f. Intentionally refusing to obtain a court ordered psychological evaluation and appraisal of property;

- g. Refusing and neglecting to pay child support as ordered by this Court;
- h. Intentionally misrepresenting his income on financial affidavits;
- i. Being found in contempt of this Court on various occasions, and intentionally refusing to follow orders to purge his contempt.

The decree's language focuses on the Defendant's actions, and specifically assesses the attorneys' fees pursuant to Superior Court Rule 59, which allows such an award in instances of "frivolous or unreasonable conduct." N.H. SUP. CT. R. 59. The decree makes no mention of either Jameson's or the Defendant's financial circumstances being a consideration for the award of attorneys' fees, unlike the divorce decree at issue in Brasslett v. Brasslett (In re Brasslett), 233 B.R. 177, 188–89 (Bankr. D. Me. 1999) (holding that an award of attorneys' fees resulting from "obstructive litigation tactics" *was* in the nature of alimony because the divorce decree stated that the award was made "*in light of the parties' respective financial circumstances*"). Beyond the decree, which is devoid of language discussing Jameson's need for reimbursement of attorney's fees, nothing in the summary judgment record shows that Jameson was unable to pay her legal expenses or was otherwise in need. The fact that the Defendant's actions resulted in Jameson incurring unnecessary expenses does not translate into the attorneys' fees being in the nature of alimony, maintenance, or support. Cooper's argument that the attorneys' fees are "support" because Jameson would have used that money to support herself if she did not have to pay unnecessary legal fees is unconvincing.

The language of the decree is punitive in nature, and the language of the decree indicates that attorneys' fees were awarded to punish the Defendant, not to serve as alimony, maintenance or support of Jameson. The divorce decree did not otherwise award alimony to Jameson, and there is no evidence before the Court that the attorneys' fees were intended as a substitute. Consequently, Cooper's motion for summary judgment is denied, and the Defendant's cross-motion for summary judgment is granted.

### **CONCLUSION**

In the Jameson adversary, Jameson's motion for summary judgment is granted. In the Cooper adversary, the Defendant's cross-motion for summary judgment is granted. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 28th day of August, 2006, at Manchester, New Hampshire.

/s/ Mark W. Vaughn  
Mark W. Vaughn  
Chief Judge